NUMBER 81

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1981

L. B. B. CORP.
Petitioner

v.

CHARLES O. FINLEY & COMPANY, INC.
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

J. Joseph Nugent, Sr. of
NUGENT & NUGENT, ESQ.
15 Westminster Street, Suite 924
Providence, Rhode Island 02903
401-421-9000

ATTORNEYS FOR PETITIONER

PETITIONER'S APPENDICES

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D. Petition for Rehearing of February 10, 1982, with Affidavits, Exhibits, and Memorandum of Authorities.

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Petitioner's Appendix A

Decision of the Trial Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 74 C 3258

L. B. B. Corporation,
Plaintiff,
vs.
Charles O. Finley & Company,
Defendant.

MEMORANDUM ORDER

This cause comes on upon the following motions: (1) defendant's motion for judgment notwithstanding the verdict; (2) plaintiff's motion for judgment notwithstanding the verdict; and (3) defendants motion to strike plaintiff's motion for judgment notwithstanding the verdict.

The court has read and considered each of the aforesaid motions and the memoranda of the respective parties and now finds that defendant's motions are well taken and should be granted for the reasons set forth in defendant's memorandum of law. Further, the court desires to note that after the jury's decision, the jurors were invited into the court's chambers to view a mastodon exhibit; that while there out of the presence of each of the counsel the jurors briefly discussed their decision and stated that five of them had found in favor of the defendant while only one had found for the plaintiff. This disclosure was later made known by the court to each party's counsel.

In view of the foregoing, it is ORDERED that each of the aforesaid motions of the defendant be and the same hereby is granted; that plaintiff's motion for judgment notwithstanding the verdict be and it hereby is STRICKEN; that judgment without costs be and the same hereby is awarded in favor of the defendant and against the plaintiff; that plaintiff take nothing by this action; and that each party pay its own costs.

ENTER:

/s/ J. S. Perry
District Judge

Dated: February 10, 1981

Petitioner's Appendices B

Unpublished *Per Curiam* Decision of the
Court of Appeals;
Corrected Unpublished Order

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 2, 1981
January 28, 1982

Unpublished Order not to be cited under Circuit Rule 35

Before

Hon. Luther M. Swygert, Senior Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge

L.B.B. CORP., Plaintiff-Appellant,
No. 81-1352

vs.

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division
No. 74-C-3258
Joseph Sam Perry, Judge

ORDER

This dispute arose out of a contract whereby the plaintiff-appellant L.B.B. Corporation (LBB) attempted to purchase a basketball franchise from the defendant-appellee Charles O. Finley and Company, Inc. (Finley). LBB tendered to Finley a deposit of $100,000 towards the purchase price. The contract

provided that LBB would "execute such applications and take such formal steps as may be required by the ABA (American Basketball League)" and the down payment would be returned if the ABA did not approve the transfer of ownership. Although the ABA conditionally approved the sale, the transfer was never completed and Finley kept the deposit. Finley believed that LBB had breached the contract by not taking the formal steps required. LBB brought suit to recover the $100,000, claiming that the conditions upon which ABA approval was contingent were not those contemplated in the contract. Thus, there was no ABA approval in fact and LBB was entitled to a return of its deposit.

The trial resulted in a hung jury and Finley's motion for judgment notwithstanding the verdict (JNOV) was granted. LBB raises three issues on appeal:

(1) Finley did not comply with Rule 50, Federal Rules of Civil Procedure, because the motion for JNOV was not in writing;

(2) the trial court did not support its decision with express findings of fact and conclusions of law; and

(3) the evidence was not sufficient to support the granting of Finley's motion for JNOV.

The answer to LBB's first argument on appeal is that Finley did file a written motion for JNOV which was docketed and became a part of the record on December 17, 1980. If LBB's counsel had taken time to examine the record, he would have discovered this fact.

LBB's second ground for appeal is also without merit. Rule 52(a), Federal Rules of Civil Procedure, requires the trial court to make findings of fact and conclusions of law only in trials without a jury. Even though the court ultimately decided this case, it was still a jury trial. Although this Court would prefer that the District Court make findings of fact and conclusions of law in directed verdicts and JNOV's, it is not mandated by the

federal procedural rules. *See, e.g., Weir v. Chicago Plastering Institute*, 272 F.2d 883, 888 (7th Cir. 1959).

LBB's third assertion of error must be dismissed. Rule 10(b)(2) of the Federal Rules of Appellate Procedure provides that: "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion". LBB has failed to comply with this rule. Further, LBB's brief failed to discuss why the record produced at trial would not support the JNOV. Rule 10(b)(2) was promulgated to allow courts to make an independent evaluation of the evidence. The court cannot make an informed decision where this rule has not been complied with.

Accordingly, the judgment appealed from is affirmed.

Unpublished Per Curiam Order
CORRECTED February 4, 1982
JUDGMENT -- WITHOUT ORAL ARGUMENT
UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
CORRECTED - February 4, 1982
January 28, 1982
Before
Hon Luther M. Swygert, Senior Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge

L.B.B. CORP.
Plaintiff-Appellant,
NO. 81-1352
vs.
CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 74-C-3258
Judge Joseph Sam Perry

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, **it is ordered and adjudged** by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the Order of this Court entered this date.

Petitioner's Appendix C

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60601

March 25, 1982

Before

Hon. Luther M. Swygert, Senior Circuit Judge
Hon. Wilbur F. Pell, Circuit Judge
Hon. William J. Bauer, Circuit Judge

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs.

CHARLES O. FINLEY & CO., INC.
Defendant-Appellee.

Appeal from the
United States District Court
for the Northern District of Illinois
Eastern Division.
No. 74-C-3258
Joseph Sam Perry, Judge.

ORDER

On consideration of the petition for rehearing filed by counsel for the plaintiff-appellant, the judges on the panel have voted to deny the petition.

IT IS THEREFORE ORDERED that said petition for rehearing be, and the same is hereby denied.

Petition's Appendix D
Petition for Rehearing

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs.

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee

Appeal from the
United States District Court
for the Northern District of Illinois
Eastern Division.

No. 74-C-3258
Joseph Sam Perry, Judge

PETITION FOR REHEARING

Now comes the Plaintiff-Appellant in the above-entitled cause to petition this honorable Court, pursuant to Circuit Rule 16, for rehearing and/or reconsideration of its decision to dismiss the appeal of the Plaintiff-Appellant, specifically of that portion of its unpublished Order of January 28, 1982 dismissing the third assertion of error for the failure of the Plaintiff-Appellant to abide by Rule 10(b)(2) of the Federal Rules of Appellate Procedure.

Further, the Plaintiff-Appellant moves this honorable Court to vacate its dismissal of the Plaintiff-Appellant's third assertion of error; and to enlarge the time in which the Plaintiff-Appellant may file a complete transcript of the trial below if this Court deems a full transcript to be necessary, for a period not to exceed sixty days.

Plaintiff-Appellant, L.B.B. Corp.

By its Attorney,

J. Joseph Nugent, Jr., Esquire
15 Westminster Street, Suite 924
Providence, Rhode Island 02903
401-421-9000

AFFIDAVIT IN SUPPORT OF PETITION FOR REHEARING

I, J. Joseph Nugent, Jr., of Westport, Massachusetts do hereby make oath and subscribe to the following facts:

1. That I am, and have been since the initiation of this litigation in the U. S. District Court in the District of Rhode Island, principal counsel to the plaintiff-appellant;

2. Following the receipt of the Memorandum Order of Senior Judge J. Sam Perry, entered on or about February 10, 1981, I caused a Notice of Claim of Appeal to be docketed in the Court on March 6, 1981;

3. Following receipt of instructions in the form of a memorandum signed by Thomas Strubbe, Clerk of the Court of Appeals, I filed a Certificate of Interest on March 12, 1981

4. On March 12, 1981, I forwarded an Order for the Transcript, an exact copy of which is attached hereto and incorporated by reference as Exhibit 1, to the office of the Clerk of the Court of Appeals, with a cover letter addressed to Alyce M. Mobley, Deputy Clerk, who had notified me by letter of March 4, 1981 that the record on appeal was due on or before March 16, 1981; at the same time, I notified her, pursuant to Circuit Rule 4(a) that I wished to have certain additional portions of the District Court record included in the record that was certified to the Court of Appeals;

5. The Order for Transcript (see Exhibit 1) was served on counsel to the defendant, since only a partial transcript was ordered; at no time did counsel for the appellee object to the contents thereof and/or serve on the undersigned counsel a designation of additional parts of the transcript to be necessarily included in the appellant's filing of said transcript;

6. On or about March 30, 1981, I received a phone call from the office of Chief Court Reporter Youker -- the person on the phone identified herself as Rosemary -- advising me that they had only recently received my Order for Transcript and further advising me to seek and obtain an extension of time within which to file the brief and/or transcript;

7. On March 31, 1981, I caused to be mailed to the Court of Appeals a Motion for Extension of Time, with an affadavit attached thereto, in which I advised this Court of my telephone conversation with the woman from the office of the Official Court Reporter, and further advising the Court that I did not have any of the transcripts necessary in order to adequately and properly prepare the brief of the Plaintiff-Appellant;

8. On April 2, 1981, I mailed a copy of the aforementioned Order for Transcript to the court reporter who sat during the trial below, Diane Meyer, together with a cover letter and a check for $50.00;

9. On or about April 25, 1981, I received excerpts of trial court proceedings, from the office of Claude W. Youker, Jr., Official Court Reporter for the United States District Court for the Northern District of Illinois, which excerpts were made a part of the Appellant's Appendices, and appended to the brief of the plaintiff-appellant filed with this Court on or about May 15, 1981.

Subscribed and sworn to before me this 10th day of February, 1982.

_____

J. Joseph Nugent, Jr.

MY COMMISSION EXPIRES
March 12, 1987

Exhibit I

To: HONORABLE J. S. PERRY, Senior District Judge
From: J. Joseph Nugent, Jr., Counsel to Plaintiff-Appellant
Re: L.B.B. CORP. vs. CHARLES O. FINLEY & CO., INC.
(No: 74-C-3258)

ORDER FOR TRANSCRIPT

NOW COMES the Plaintiff-Appellant in the above-entitled cause, and pursuant to F.R.A.P. 10(b), hereby orders the stenographic record of the following portions of proceedings, with exact or approximate dates, in said cause which it deems necessary for the record on appeal:

(1) The Defendant's Motion for Directed Verdict made orally on or about December 4, 1980 at approximately 11:00 A.M.;

(2) All post-trial proceedings, including questioning of and/or colloquy with members of the jury, motions, arguments, etc. following instructions to the jury and retirement of the jury to deliberate at approximately noontime on December 5, 1980.

/s/ J. Joseph Nugent, Jr.

J. Joseph Nugent, Jr.
NUGENT & NUGENT, ESQUIRE
925 Hospital Trust Building
Providence, Rhode Island 02903
401-421-9666

CERTIFICATION

I hereby certify that I caused to be served an exact copy of the within Order for Transcript on the following interested counsel, via U.S. first-class mail, postage prepaid, on March 12, 1981: AVERY, HODES, COSTELLO & BURMAN, 221 North LaSalle Street, Suite 3800, Chicago, Illinois 60601; SAMUEL V.P. BANKS, ESQ., 180 North LaSalle Street, 38th Floor, Chicago, Illinois 60601.

/s/ J. Joseph Nugent, Jr.

SUPPLEMENTAL AFFIDAVIT
IN SUPPORT OF PETITION FOR REHEARING

I, J. Joseph Nugent, Jr., of Westport, Massachusetts do hereby make oath and subscribe to the following facts:

1. I am, and have been since the initiation of this litigation in 1974, principal counsel to the Plaintiff, a Rhode Island corporation;

2. On or about December 19, 1981, I received a letter from a Mr. Branch, Deputy Clerk of the Court of Appeals for the Seventh Circuit, an exact copy of which is attached hereto and incorporated by reference, wherein I was informed that "because of the Courts decision to decide your appeal on the records and briefs, the Court feels to make a more informed decision, the transcripts will be needed". (See Exhibit 1 attached hereto);

3. On or about December 22, 1981, I placed a telephone call to Deputy Clerk Branch, wherein he expressed ignorance of the details, facts, and circumstances surrounding the writing of the letter signed by him on December 15, 1981; he referred me to a superior, a Mr. Paul Grossman;

4. On December 29, 1981, I spoke with Mr. Grossman by telephone; he advised me that the ". . . Court wants more . . . does not have enough to make an informed decision". When I asked him if the Court wanted the entire trial transcript, he told me that he assumed that the Court wanted the entire trial transcript, he told me that he assumed that the Court did want the entire trial transcript, and told me that, "You're not going to get a decision until you file it ...";

5. On December 31, 1981, I wrote a letter to the Court Reporter, after remembering her name with difficulty, who had been present during the trial of the within case in District Court, an exact copy of which is attached hereto and incorporated by reference as Exhibit 2;

6. On January 6, 1982, I returned a telephone call of Mrs. Myer-Moran, who advised me that the entire trial transcript would cost approximately $1,550.00, of which she would require an advance payment of one-half of that amount;

7. I thereafter, on or about January 12, 1982, wrote to Mr. Branch at the Office of the Clerk of the Court of Appeals asking "if there is anything specific that occurred at the trial which the Court deemed necessary to be transcribed, in light of the great expense that will be necessary to transcribe the entire trial proceedings"; (see Exhibit 3 attached hereto and incorporated by reference);

8. At the time of the filing of the Appellant's brief, on or about May 15, 1981, the undersigned counsel appended to said brief, in conformity with Local Rule 12, transcripts of all of the proceedings which took place in the District Court below following the Court's instructions to the jury on or about December 5, 1980;

9. The undersigned counsel did not receive, at any time between January 12, 1982 and February 4, 1982, a written or oral response to his letter which is attached hereto as Exhibit 3; his first notification that he was in violation of Rule 10(b) of the Federal Rules of Appellate Procedure was received in the form of the Court's unpublished Order dated January 28, 1982, which Order was received on February 4, 1982, and is attached hereto and incorporated by reference as Exhibit 4.

/s/ J. Joseph Nugent, Jr.

Subscribed and sworn to before me this tenth day of February 1982, at Westport, Massachusetts.

/s/ Gerard R. Hadjer

(SEAL)

MY COMMISSION EXPIRES
MARCH 12, 1987

Exhibit 1

United States Court of Appeals
For The Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Thomas A. Strubbe
Clerk
312-435-5850

In Re:
L.B.B. CORP.
vs.
CHAS. O. FINLEY & CO.
No. 81-1352 *12/15/81*

Dear Sir:

I am writing to inform you that because of the Courts decision to decide your appeal on the records and briefs, the Court feels that to make a more informed decision the transcripts will be needed.

Therefore the Court is requesting that you order the transcripts from the court reporter, so that they may be certified by the District Court and then transmitted to our office. If you have any questions concerning this request please contact our office.

Respectfully,

Deputy Clerk

Called Mr. Branch on December 22, 1981; wants me to call Mr. Grossman for further clarification.

Mr. Paul Grossman (December 29) - court wants more - does not have enough to make an informed decision - he assumes that that means the entire trial. Said: "You're not gonna get a decision until you file it..."]

Exhibit 2

December 31, 1981

Diane Meyer, Official Court Reporter
U. S. District Court
1918 U. S. Court House
219 South Dearborn Street
Chicago, IL 60604

RE: **L.B.B. Corp. v. Charles O. Finley & Co., Inc.**
(No. 74-C-3258)

Dear Diane:

As you can see from the enclosed letter, the Court of Appeals in the above-referenced matter is requiring more transcript than we have filed as appendices to our brief.

At your earliest opportunity, please provide me with an estimate of the cost of the trial transcript, which occurred between December 1 and December 8, 1980, excluding what you have already transcribed.

You have provided me with: argument and decision on motion for directed verdict on December 4, 1980; colloquy between court and counsel while jury was deliberating on December 8, 1980; argument, colloquy and decision on December 23, 1980 on the motion of the defendant for judgment notwithstanding the verdict.

Thank you in advance for your cooperation. Happy New Year.

Very truly yours,

J. Joseph Nugent, Jr.
(401) 421-9000

JNN,Jr./dm
Enc.

Exhibit 3

NUGENT & NUGENT, ESQUIRE
Attorneys and Counsellors at Law
15 Westminster Street, Suite 924
Providence, Rhode Island 02903

January 12, 1982

U. S. Court of Appeals
Office of the Clerk
219 South Dearborn Street
Chicago, Illinois 60604

RE: L.B.B. Corp. v. Charles O. Finley & Co., Inc.
(81-1352)

Dear Mr. Branch:

I spoke to you on December 22, 1981, regarding your letter of December 15, 1981 informing me that the Court felt that to make a more informed decision "the transcripts will be needed". You referred me at that time to a Mr. Grossman for further clarification.

I spoke to Mr. Grossman on December 29, and he told me that he assumed that the Court wanted the entire transcript of the trial, other than what was already provided and appended to the briefs. I told him that I would speak to my client.

I have spoken to my client, who does not have the means to pay for the entire trial transcript - I have obtained an estimate from the stenographer at the trial and the estimate was over $1500 - and he has asked me to write to see if there is anything specific that occurred at the trial which the Court deems necessary to be transcribed, in light of the great expense that will be necessary to transcribe the entire trial proceedings.

I await your advice.

Very truly yours,
/s/ J. Joseph Nugent, Jr.
J. Joseph Nugent, Jr.
(401) 421-9000

Exhibit 4

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Submitted December 2, 1981

January 28, 1982

Before
Hon. Luther M. Swygert, Senior Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge

L.B.B. CORP.,
Plaintiff-Appellant,
NO. 81-1352
vs.
CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee.

Appeal from the
United States District Court
for the Northern District of Illinois
Eastern Division.

No. 74-C-3258
Joseph Sam Perry, Judge

ORDER

This dispute arose out of a contract whereby the plaintiff-appellant L.B.B. Corporation (LBB) attempted to purchase a basketball franchise from the defendant-appellee Charles O. Finley and Company, Inc. (Finley). LBB tendered to Finley a deposit of $100,000 towards the purchase price. The contract provided that LBB would "execute such applications and take such formal steps as may be required by the ABA (American Basketball League)" and the down payment would be returned if the ABA did not approve the transfer of ownership. Although the ABA conditionally approved the sale, the transfer

was never completed and Finley kept the deposit. Finley believed that LBB had breached the contract by not taking the formal stepos required. LBB brought suit to recover the $100,000 claiming that the conditions upon which ABA approval was contingent were not those contemplated in the contract. Thus, there was no ABA approval in fact and LBB was entitled to a return of its deposit.

The trial resulted in a hung jury and Finley's motion for judgment notwithstanding the verdict (JNOV) was granted. LBB raises three issues on appeal:

(1) Finley did not comply with Rule 50, Federal Rules of Civil Procedure, because the motion for JNOV was not in writing;

(2) the trial court did not support its decision with express findings of fact and conclusions of law; and

(3) the evidence was not sufficient to support the granting of Finley's motion for JNOV.

The answer to LBB's first argument on appeal is that Finley did file a written motion for JNOV which was docketed and became a part of the record on December 17, 1980. If LBB's counsel had taken time to examine the record, he would have discovered this fact.

LBB's second ground for appeal is also without merit. Rule 52(a), Federal Rules of Civil Procedure, requires the trial court to make findings of fact and conclusions of law only in trials without a jury. Even though the court ultimately decided this case, it was still a jury trial. Although this Court would prefer that the District Court make findings of fact and conclusions of law in directed verdicts and JNOV's, it is not mandated by the federal procedural rules. *See, e.g., Weir v. Chicago Plastering Institute*, 272 F.2d 883, 888 (7th Cir. 1959).

LBB's third assertion of error must be dismissed. Rule 10(b)(2) of the Federal Rules of Appellate Procedure provides that: "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion". LBB has failed to comply with this rule. Further, LBB's brief failed to

discuss why the record produced at trial would not support the JNOV. Rule 10(b)(2) was promulgated to allow courts to make an independent evaluation of the evidence. The court cannot make an informed decision where this rule has not been complied with.

Accordingly, the judgment appealed from is affirmed.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,
No. 81-1352
vs
CHARLES O. FINLEY & CO., INC.
Defendant-Appellee

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division.
No. 74-C-3258
Joseph Sam Perry, Judge

APPELLANT'S MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

For this Court to refuse to rehear and reconsider its decision to dismiss the instant appeal for technical reasons on January 28, 1982 would be, if only in light of the passage of time since the initiation of this litigation and the efforts expended and expenses incurred by both sides, not only the cause of extreme hardship to the Appellant; it will also demean and subvert the system of civil adjudication in effect in the Seventh Circuit and in the United States of America.

The major ground of the Plaintiff's appeal, namely that the trial court erred in entering judgment notwithstanding the verdict on

or about February 10, 1981, was based on the very simple fact that the decision of the trial judge to do so was manifestly erroneous on the face of that record which was appended to the Appellant's brief, filed in May of 1981 pursuant to Circuit Rule 12.

That is because, on December 4, 1980, during the trial, the trial judge, after hearing the defendant's motion for a directed verdict, stated as follows:

"**THE COURT:** I think that this is a case for the jury. Motion denied."

On December 8, 1980, while the jury below was in deliberation, the Court decided in the absence of counsel to discharge the jury and declare a mistrial, then stated as follows:

"**THE COURT:** Gentlemen, you are now discharged. I will invite you into my chambers to take a look at an exhibit that I have.

And of course, there will have to be a new trial; that is if the Plaintiff persists in a new trial. And the reason that I have asked now as to the division, is in order to guide the principles and the parties to what their future conduct might be. It might be possible that the plaintiff may not choose to try the case again under the circumstances, but that is the decision. You are now discharged.

And I will invite you in. Ms. Marshal, you may bring them into my chambers, and I will discuss the matter with them -- not the case, **I will not discuss the case,** but only my exhibit which is in my chambers. (Emphasis supplied)."

Notwithstanding his representations made on the record in Court at the time that the mistrial was declared, the trial judge failed and refused to refrain from discussing the case with the jurors after they had repaired to his chambers with him. That is self-evident from the memorandum decision filed by the trial judge on or about February 10, 1981. In that "Memorandum Order" the trial judge stated as follows:

"The Court desires to note that after the jury's decision, the

jurors were invited into the Court's chambers to view a mastodon exhibit; the jurors briefly discussed their decision and stated that five of them had found in favor of the defendant while only one had found for the plaintiff. This disclosure was later made known by the Court to each party's counsel.

In view of the foregoing, it is ORDERED that each of the aforesaid motions of the defendant be and the same hereby is granted . . ."

Hence, in the view of the Appellant, the decision of the trial judge in February, 1981 to enter judgment notwithstanding the verdict in favor of the defendant was facially deficient, because of his blatant reliance on what he had been told, off the record, by the members of the jury out of the presence of counsel. The error, which the Appellant still maintains is reversible, is therefore clear from the record appendix attached to the Appellant's brief.

To further clarify the position of the Appellant, the Appellant has not requested the panel to decide whether or not the trial judge incorrectly weighed or viewed the evidence in granting the defendant's motion for judgment notwithstanding the verdict. The Appellant stops at the threshhold question of whether or not the Court observed the correct standards to be employed in determining whether or not judgment n. o. v. should have been entered; we are not asking the Court to examine the evidentiary record for its sufficiency insofar as the Appellant's position is concerned. Assuming for the sake of the argument in support of this petition that the position taken by the Appellee is correct, namely that the proper standards for direction of verdicts and entry of judgments notwithstanding the verdict in diversity cases is the State standard, and that the State standard in Illinois as outlined in *Pedrick vs Peoria E.R.R. Co.*, 229 N.E. 2nd 504,513 -- a decision cited by the Appellee in its brief -- is that "the movant is entitled to a directed verdict or judgment notwithstanding the verdict, when all the evidence, viewed in its aspects most favorable to the non-movant so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand," it is then manifestly clear from the record already before this Court that the trial

judge did not observe, apply, or perhaps even know about the existence of such a requirement before he entered judgment n. o. v. for the Appellee. In fact, all one has to do is to return to his decision of February 10, 1981, wherein he stated that: "The Court has read and considered each of the aforesaid motions and the memoranda of the respective parties and now finds that defendant's motions are well taken and should be granted for reasons set forth in defendant's Memorandum of Law.".

But it is crystal clear from the record that there was never any Memorandum of Law filed by the defendant in support of its Motion for Judgment Nothwithstanding the verdict; rather, there was a Memorandum of Law filed by the defendant-appellee in support of another motion that had been filed on December 23, 1980, to strike the motion of the Plaintiff-Appellant for judgment notwithstanding the verdict. Consequently, there was yet another error, this one of fact, to compound the impropriety in discussing the case with the jury after it was discharged after representing otherwise on the record, and in failing to apply or observe or even articulate the proper standard of review before granting the motion for judgment n. o. v.

For the aforesaid reasons, the Appellant urges that the Petition for Rehearing, as regards to the second assignment of error, be granted; if this Court deems the filing of a complete file transcript necessary the Appellant prays further for an enlargement of time in which to do so.

Respectfully submitted

J. Joseph Nugent, Jr.
15 Westminster Street, Suite 924
Providence, RI 02903
401-421-9000

602 State Road
Westport, MA 02790
617-672-0139

Date: February 10, 1982

Petitioner's Appendix E
Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division.
No. 74-C-3258
Joseph Sam Perry, Judge

PETITION FOR REHEARING EN BANC

Now comes the Plaintiff-Appellant in the above-entitled cause to petition this honorable Court for a rehearing and/or reconsideration of the unpublished Per Curiam opinion of the three-judge panel assigned to decide this matter on January 28, 1982, specifically as it regards the first and third arguments advanced by the Plaintiff-Appellant on appeal, on the grounds that the within appeal is of exceptional importance because of the panel's unprecedented application of the service provisions of subsections 5(a) and 5(b) of the Rules of Civil Procedure, and because of its disregard of a decision of the U. S. Supreme Court, cited in the Memorandum of Law attached hereto and incorporated by reference, and the creation of an apparent conflict with the Court of Appeals for the Sixth Circuit in deciding that a trial judge need not support entry of judgment

notwithstanding the verdict with findings of fact and conclusions of law.

By its Attorney

J. Joseph Nugent, Jr.
15 Westminster Street, Suite 924
Providence, Rhode Island 02903

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs.

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division.

No. 74-C-3258
Joseph Sam Perry, Judge

AFFIDAVIT IN SUPPORT OF PETITION FOR REHEARING EN BANC

I, J. Joseph Nugent, Jr., of Westport, Massachusetts, do hereby make oath and subscribe to the following facts:

1. That I am, and have been since the initiation of this litigation in the U. S. District Court for the District of Rhode Island in 1974, principal counsel to the appellant;

2. Between the time of my admission to the Bar of the State of Rhode Island in 1971 and May 1, 1976, my law offices were located on the sixth floor of a building in Providence, RI, whose street address was 32 Westminster Street; thereafter, to and including February 1, 1982, my regular and usual business address was 15 Westminster Street, Suite 924, (also known as 924 Hospital Bank Building), Providence, RI;

3. At no time did I receive in the mail, or was I otherwise served with, an exact copy of the defendant-appellee's Motion for Judgment Notwithstanding the Verdict, which was apparently

filed in the District Court on or about December 12, 1980, until I received a copy appended to its brief on or after June 25, 1981; an exact copy of the certificate of service preceeding the motion for judgment n. o. v. is attached hereto and incorporated by reference as Exhibit 1.

4. I did not receive the unpublished Per Curiam Order of the three-judge panel of this Court, dated January 28, 1982, until February 4, 1982.

/s/ J. Joseph Nugent, Jr.

Subscribed and sworn to before me this 12th day of February, 1982, at Westport, Massachusetts.

/s/ Gerard R. Hadjer, Notary

MY COMMISSION EXPIRES
MARCH 12, 1987

Exhibit 1

APPELLEE'S APPENDIX I

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

L.B.B. CORP., INC.,
Plaintiff,

vs.

CHARLES O. FINLEY & CO., INC.,
Defendant. NO. 74-C-3258

NOTICE OF MOTION

TO:
J. Joseph Nugent, Jr.
Nugent & Nugent
32 Westminster Street
Providence, Rhode Island 02903

Jeffrey I. Langer
Arvey, Hodes, Costello & Burman
180 N. LaSalle Street
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on December 16, 1980, at 10:00 A.M. or as soon thereafter as counsel may be heard, Defendant, by its Attorney, SAMUEL V. P. BANKS, shall appear before the Honorable J. Sam Perry, or any Judge sitting in his stead, and then and there present a Motion for Judgment Notwithstanding the Verdict, a copy of which is attached hereto.

SAMUEL V. P. BANKS
Attorney for the Defendant
221 N. LaSalle St., 38th Floor
Chicago, Illinois 60601
782-1983

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs.

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING EN BANC

The plaintiff-appellant, L.B.B. Corp., a Rhode Island corporation, files the within petition for two reasons: The three-judge panel assigned to decide the appeal disposed of two issues incorrectly by unpublished Order on January 28, 1982. The panel decided that the Appellant was mistaken when it asserted on appeal that the Appellee ("Finley") did not comply with F. R. Civ. P.50 because its Motion for Judgment Notwithstanding the Verdict (JNOV) was not in writing. The Court disposed of that Assertion as follows:

The answer to L.B.B.'s first argument on appeal is that Finley did file a written motion for JNOV which was docketed and became a part of the record on December 17, 1980. If L.B.B.'s counsel had taken time to examine the record, he would have discovered this fact.

This may be correct, but the finding of the Court, namely that the docketing of the motion was sufficient to obviate any claim of apeal flies in the face of F. R. Civ. P. 5(a), (b), regarding service of motions and other pleadings on counsel to all parties. In fact, the Motion for JNOV was not received by Appellant's

counsel. See Affadavit and Exhibit attached hereto.

The second basis for this petition, which clearly involves a question of exceptional importance **and** a possible conflict with decisions of both the U. S. Supreme Court and other courts of appeals, was the refusal of the panel to require the District Court to make findings of facts and conclusions of law at the time that it granted the motion of the appellee for JNOV. The panel determined that this safeguard "is not mandated by the federal procedural rules", citing **Weir vs Chicago Plastering Institute,** 272 F 2d 883,888 (7th Cir. 1959), a decision which is both outdated and inapposite, since it involves only entry of a directed verdick during the course of the trial.

It is the position of the Appellant that, in light of the decisions of the U. S. Court of Appeals for the Sixth Circuit in **Garrison vs Jervis B. Webb Co.,** 583 F. 2d 258 (1978) and **Morelock vs N.C.R. Corp.,** 586 F. 2d 1096 (1978), and because of the mandate of the U. S. Supreme Court in **Baltimore & Carolina Line vs Redman,** 295 U. S. 654 (1935), a question of exceptional importance is created.

In **Redman, supra** the High Court permitted the lower court to rule for the movant on a motion for JNOV only because there has been a reservation by the trial judge of a ruling on the motion for directed verdict which had been filed and/or argued during the trial. The Supreme Court said in that case that the parties' constitutional right to a jury trial was not violated or the province of the jury invaded so long as sufficient evidence was not present so as to justify the reversal of a jury verdict, **and** only because the trial judge had "expressly reserved its ruling on the defendant's motions to dismiss and for a directed verdict," both of which were based on the asserted **legal** insufficiency of the evidence. (Emphasis supplied.) Here, it is a matter of record that the trial judge did not reserve his ruling on the defendant's motion for directed verdict at trial, but denied it outright at the conclusion of the plaintiff's case on December 4, 1980.* See also, **Weade vs Dichmann, Wright, & Pugh, Inc.,** 337 U. S. 801, wherein the Court expressed clear disfavor for the entry of judgments n. o. v. without adequate, explicit support in the record. Here, the trial judge disposed of the parties' post-trial motions as follows:

The Court has read each of the aforesaid motions and the memoranda of the respective parties and now finds the defendant's motions are well taken and should be granted for the reasons set forth in the defendant's Memorandum of Law.

In so far as the F. R. Civ. P. 5 question is concerned, the only reason that it is raised is because of the obvious error of the panel that it is the obligation of the non-movant party to search out the docketed record in the District Court before any assertion of error for violation of Rule 5 can be asserted on appeal. This, of course, is not the case, and the Rule, particularly sub-sections (a) and (b), are clearly to the contrary. The rule reads in pertinent part that: ". . . the service **shall** be made upon the attorney unless service upon the party himself is ordered by the Court". (Emphasis supplied.) In the absence of proper service of motions particularly motions for JNOV, the District Court in fact had no jurisdiction to adjudicate the issue before it. See **American Tel. & Tel. Company vs Merry** 592 F. 2d 118,126 (2d Cir. 1979).

Respectfully submitted,

J. Joseph Nugent, Jr., Esquire

*See Page 20 of Appellant's Original Appendix

Petitioner's Appendices F
Supplemental Petition for Rehearing En Banc

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee.

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division.

No. 74-C-3258

Judge J. Sam Perry

SUPPLEMENTAL PETITION FOR REHEARING EN BANC OF THE APPELLANT

Submitted:

J. Joseph Nugent, Jr.
NUGENT & NUGENT, ESQ.
15 Westminster Street
Providence, Rhode Island 02903
401-421-9000

602 State Road
Westport, Massachusetts 02790
617-672-0139

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- Supplemental Affidavit in Support of Petition for Rehearing
- Memorandum in Support of Petition for Rehearing

CERTIFICATE OF SERVICE

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division

No. 74-C-3258
Joseph Sam Perry, Judge

SUPPLEMENTAL PETITION FOR REHEARING EN BANC OF THE APPELLANT

Now comes the Plaintiff-Appellant in the above-entitled cause to petition this honorable Court for a rehearing and/or reconsideration of the unpublished Per Curiam opinion of the three-judge panel assigned to decide this matter, of January 28, 1982, and its subsequent denial of the Petition of the Plaintiff-Appellant for Rehearing, which Petition was denied on or about March 25, 1982 by said three-judge panel without comment. See Exhibit A attached hereto.

This supplemental petition, which arises from the **sua sponte** dismissal of the Plaintiff-Appellant's third assertion of error for violation of F. R. A. P. 10(b) (2), presents a question of exceptional importance because of the misuse and misapplication of said Rule by the three-judge panel, which misuse and/or misapplication has resulted in a denial of the appellant's con-

stitutional right to a jury trial under the Seventh Amendment to the U. S. Constitution.

See Memorandum and Appendix attached hereto.

Plaintiff-Appellant,

By his Attorney

J. Joseph Nugent, Jr.

602 State Road
Westport, Massachusetts 02790
617-672-0139

15 Westminster Street
Suite 924
Providence, Rhode Island 02903
401-421-9000

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division.

No. 74-C-3258
Joseph Sam Perry, Judge

MEMORANDUM IN SUPPORT OF SUPPLEMENTAL PETITION FOR REHEARING EN BANC

On January 28, 1982, a three-judge panel of this Court filed an unpublished Order wherein it denied and dismissed the appeal of the plaintiff-appellant. The panel boiled the appeal of the plaintiff-appellant down to three issues, and decided them in the following order: the first issue raised was not well-founded in the record, and in fact was mistakenly raised; the third issue raised, namely that the Trial Court should have supported its decision to grant a motion of the defendant-appellee for judgment notwithstanding the verdict with express findings of fact and conclusions of law, was without merit because the Federal Rules of Civil Procedure do not explicitly require Trial Judges to make such findings of fact and conclusions of law; the last issue, characterized by the panel as "LBB's third assertion of error", when in fact it was the second exception briefed and argued by the plaintiff-appellant, that the defendant's motion for judgment notwithstanding the verdict should not have been granted for the reason put forth by the Trial Judge,

was disposed of by a **sua sponte** dismissal because of an alleged violation by the plaintiff-appellant of Rule 10(b) (2) of the Federal Rules of Appellate Procedure.

Since the Court's disposition of the "third assertion of error" of the plaintiff-appellant was based on an assumed violation of the Rules of Appellate Procedure, which was not so, the plaintiff-appellant petitioned for rehearing by the three-judge panel, on or about February 10, 1982.[1] The argument of the plaintiff-appellant in said Petition was two-fold, namely that the panel was mistaken in assuming that the plaintiff-appellant had violated the Rule by failing to provide adequate transcripts to permit this Court to make an informed decision and, moreover, whether or not a complete trial transcript was provided, the record appended to the brief of the plaintiff-appellant revealed reversible error so clearly as to not require any additional transcription of any additional evidence produced at the trial. In short, the error, manifestly clear from the record already on appeal, was obvious on the face of the written decision of the Trial Judge of February 10, 1981, granting the motion of the defendant-appellee for judgment notwithstanding the verdict. If it were not so obvious, then the allegation of error was substantiated by the transcribed record obtained by the plaintiff-appellant and appended to its brief in May of 1981, mostly of post-trial hearings and proceedings.

Consequently, the plaintiff-appellant, in a nutshell, had complied with F. R. A. P. 10(b) (2) even though it did not have to do so to the extent of providing a complete trial transcript.

Moreover, the plaintiff-appellant wishes to point out once again (see his previous argument attached to his Petition for Rehearing, attached hereto and incorporated by reference as Appendix 1), that it did not at any time intend to urge on appeal that "a finding or conclusion is unsupported by the evidence or is contrary to the evidence" F. R. A. P. 10 (b) (2). As it has argued before, the plaintiff-appellant sought merely to demonstrate that the decision of February 10, 1981, was based on both mistakes and improprieties occurring during post-trial proceedings, not on an incorrect assessment or review of the evidentiary record by the Trial Judge.[2]

For the above reasons, and for the reasons set forth in the earlier argument attached hereto and incorporated by reference (Appendix 1), and for the reason that the Seventh Amendment to the U. S. Constitution, as interpreted in this context by the U. S. Supreme Court in **Slocum vs. New York Life Insurance Co.,** 33 S. Ct. 523 (1913) and in **Baltimore & Carolina Line vs. Redman,** 55 S. Ct. 890 (1935)[3] , has been violated by the refusal of both the District Court and this Court to give plaintiff-appellant a new trial, the plaintiff-appellant prays herein for rehearing and restoration of this cause to the calendar for a decision on the merits.

[1] In fact, at the same time that the plaintiff-appellant so moved before the three-judge panel on February 10, 1982, the plaintiff-appellant moved for an enlargement of time in which to obtain and file a complete transcript of the trial proceedings if this Court deems it essential. Partial payment for such transcript has been forwarded to the trial reporter.

[2] According to the decision of the Seventh Circuit Court of Appeals in **Bonner vs. Coughlin,** 657 F. 2d 931 (7th Cir. 1981) at pages 938-939, in order for a trial court to properly grant a motion for JNOV the motion must be reserved for decision by the trial judge if made before the close of all the evidence if not made or renewed at the close of all of the evidence. This decision implies that a reversal will necessarily follow a failure of a Trial Judge to observe this procedure, with no need for the appealing party to prove also that the grant of the motion was not supported by any of the evidence at the trial. This is a similar review situation.

[3] See also **Munn vs Mutual Services Casualty Insurance Co.,** 88 FRD 364, 367, fn. 8 (N. D. Calif. 1980)

Exhibit A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

March 25, 1982

Before

Hon. Luther M. Swygert, Senior Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge

L.B.B. CORP.,
Plaintiff-Appellant,

No. 81-1352

vs.

CHARLES O. FINLEY & CO., INC.,
Defendant-Appellee.

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division.

No. 74-C-3258
Joseph Sam Perry, Judge

ORDER

On consideration of the petition for rehearing filed by counsel for the plaintiff-appellant, the judges on the panel have voted to deny the petition.

IT IS THEREFORE ORDERED that said petition for rehearing be, and the same is hereby denied.

CERTIFICATE OF SERVICE

I, J. Joseph Nugent, Jr., do hereby certify under the pains and penalties of purgery that I served, via regular U.S. Mail, postage prepaid, two exact copies of the foregoing petition for Issuance of Writ of Certiorari and Appendices on Terrence P. LeFevour and Samuel V.P. Banks on July 29, 1982 at their regular and usual business address: 221 N. LaSalle St., 38th Floor, Chicago, Illinois 60601.